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ABSTRACT

This booklet examines the risks that college and universities face due to student alcohol use and abuse, and outlines procedures that institutions can use to develop effective alcohol policies. Although legal precedents have recognized that colleges and universities do not have a duty to supervise student conduct under principles of in loco parentis, as landlords and proprietors colleges have a legal responsibility to maintain safe premises. Recent legislation also requires colleges and universities to provide educational programs to prevent the illegal use of drugs and alcohol. In order to develop an alcohol policy that balances concern for student with protection against institutional liability, schools should: (1) adopt only rules and sanctions that the school is willing to enforce; (2) enforce the policy consistently; (3) be familiar with all laws relating to the sale of alcoholic beverages and the liability of "social hosts" who serve beverages; (4) emphasize alcohol education programs; and (5) focus on circumstances that present the greatest danger and risk of liability. Examples of recent court cases are provided. (Contains 38 references.) (MDM)

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DEVELOPING EFFECTIVE AND LEGALLY SOUND ALCOHOL POLICIES

HOW WELL DOES YOUR ALCOHOL POLICY WORK?

Five years after the passage of the Drug-Free Schools and Communities Act Amendments which required all institutions to implement substance abuse policies, alcohol use and the development of effective alcohol policies continue to be major concerns on college campuses. This article reviews the current legal climate and how it affects the development and administration of sound alcohol policies, with comments from college and university administrators on their experiences in implementing institutional alcohol policies.

This paper was written by Eugene D. Gulland, Esq., of the Washington law firm of Covington & Burling. Mr. Gulland has represented the American Council on Education and a number of academic institutions in cases involving alcohol liability and other issues.

"If the average student on your campus is familiar with the college's alcohol policy and what the consequences are for breaking the rules on alcohol use, and the policy includes an education and prevention program, then your policy is doing what it is supposed to do."

Elizabeth M. Nuss
Executive Director of NASPA

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EXECUTIVE SUMMARY

Student alcohol abuse continues to impose social, educational, medical, disciplinary, and other burdens on the nation's colleges and universities. The Drug Free Schools and Communities Act Amendments of 1989 require colleges and universities to adopt and implement written policies to address alcohol and other substance abuse by students (and employees). Policies must prohibit conduct that violates the law. But institutions have broad discretion in determining the extent to which they will directly supervise student conduct.

Although legal trends in this area are encouraging, the risk of institutional liability still exists. Judicial decisions generally recognize that schools lack the practical means and legal authority to control their students' personal conduct, and that educational institutions should not be held legally responsible for failing to prevent all alcohol abuse *where they have acted reasonably and in good faith in implementing their policies*. A practical and legally sound alcohol policy is essential to respond to the institution's mission and to minimize the risk of liability.

In order to develop an alcohol policy that balances concern for students with protections against institutional liability, schools should give special consideration to the following points:

- **Adopt only rules and sanctions that the school is willing to enforce**. There is much greater risk of liability for failure to enforce strict supervisory rules and regulations than there is for conscientious implementation of policies that emphasize student responsibility and that impose sanctions when students fail to fulfill their obligations.

- **Enforce the policy consistently** while respecting students' rights to privacy and to fair hearing procedures that meet procedural due process requirements.

- **Be familiar with all laws relating to the sale of alcoholic beverages and the liability of "social hosts" who serve beverages**.

- **Emphasize education**, both as a general means of acquainting students with the dangers of substance abuse and as a response to violations of the school's policy. Educational programs play to the strength of colleges and universities, and they are likely to be more effective than attempts to use sanctions as means of controlling the personal conduct of students.

- **Focus on circumstances that present the greatest danger and risk of liability** -- situations in which the school is involved in selling alcoholic beverages or acting as a social host (including cases where faculty, resident advisors, or other employees provide alcohol to students), and recurring patterns of alcohol abuse during particular events or by repeat offenders.

"It is the responsibility of senior administrators to ensure that Board members have the facts as to what the alcohol policy is and what practical approaches we take in assuring the policy is followed. It is our job to be absolutely clear and honest in what we communicate to them. There will never be a perfect alcohol policy, and Board members need to understand where the soft spots are. I believe it is the Board's role to ask hard questions and make the decision as to whether the institution's alcohol policies and practices present an acceptable level of risk."

Marsha Duncan
Vice President for Student Affairs
Lehigh University

DEVELOPING EFFECTIVE AND LEGALLY SOUND ALCOHOL POLICIES

Although the legal drinking age is now 21 and federal law requires that every institution receiving federal aid have a substance abuse policy, alcohol continues to be the major substance abuse problem on college campuses. National studies have found that binge drinking is common at many colleges and universities, and that such behavior is closely linked to rape, other violent crime, the spread of sexually-transmitted diseases, declining academic performance, and growing alcoholism among college youth.[1]

One thing has become clear in the five years since the passage of the Drug-Free Schools and Community Act Amendments: institutions must be willing to put into action what they say they will do in their written policies. In their efforts to protect students from the consequences of alcohol misuse, institutions may unwittingly increase their liability for alcohol-related incidents if they promise more oversight of student conduct than they can realistically deliver. The challenge in writing effective alcohol policies is to balance concern for students' welfare with the need to minimize institutional liability.

Although most courts are recognizing that it is impossible to eliminate student alcohol abuse and therefore unfair to impose liability on colleges for all resulting injuries, institutions can still be liable for student alcohol abuse in their roles as landlord, seller of alcohol, and social host. However, by observing common sense guidelines in developing alcohol policies, colleges and universities can develop policies designed to help students without increasing their liability for the consequences of student misbehavior.

KEY PROTECTIONS AGAINST INSTITUTIONAL LIABILITY

- Maintain premises that are safe from foreseeable hazards, including predictable or recurrent conduct by students presenting risks to others.
- Comply with all state and local laws governing licensing and the sale of alcoholic beverages.
- Be familiar with state and local laws relating to "social host" liability for serving alcoholic beverages.
- Implement a written policy on student alcohol use that complies with the minimum requirements of the Drug-Free Schools and Communities Act Amendments of 1989.

LEGAL PRINCIPLES GOVERNING INSTITUTIONAL LIABILITY FOR STUDENT ALCOHOL ABUSE

The Eclipse of *In Loco Parentis*

Leading court cases recognize that colleges and universities have no broad duty and lack the practical ability to control students' private conduct. These decisions stress that a university neither possesses the authority over, nor owes the duty to, a college-age student that a parent does to a child, or a primary or secondary school owes to its students.[2]

Bradshaw v. Rawlings (1979)[3] is an influential decision in this area. While returning from a sophomore class picnic, Donald Bradshaw suffered serious injuries as a passenger in a car that was driven by an intoxicated classmate. The picnic was an annual event that a faculty advisor helped to plan but did not attend. The advisor co-signed the check that was used to buy beer, flyers advertising the event on campus featured beer mugs, and many attendees were underage drinkers.

Despite these entanglements with student drinking, the court ruled that the college was obliged neither to control the conduct of the student driver nor to protect students traveling to and from the off-campus picnic. The court recognized that colleges lack the practical ability and the legal means to

control students' private conduct. It also stressed that the opportunity for students to assume responsibility for their own behavior is an important aspect of a college education. It concluded that the college should have no special duty to enforce laws against underage drinking.

With limited exceptions, the principles underlying the Bradshaw decision have prevailed against many efforts to overrule, circumvent, or distinguish them. However, one recent case strikes a different note. In Furek v. University of Delaware (1991),[4] the Delaware Supreme Court found that a jury was entitled to judge a state university's obligations to a student who was seriously injured during fraternity "hell week" by fraternity hazing accompanied by underage binge drinking. While the court agreed that the university owed no general duty to supervise student conduct under principles of *in loco parentis*, it found that the school's extensive regulation of hazing could reasonably lead a jury to conclude that the school had failed to act with reasonable care to prevent the incident resulting in the student's injury. The court criticized the Bradshaw line of cases as establishing too broad an immunity for universities in relation to dangerous on-campus activities regulated by school rules and monitored by security personnel.

Although Furek states a minority view, it reminds us of three important points:

- The outcome of litigation is inherently uncertain and there is no guarantee that even the most effective alcohol policy will protect a school from liability if an accident occurs.

- Courts (and juries) are often ambivalent about whether college students are adults or immature youths needing supervision; courts may sometimes disclaim *in loco parentis* as outdated, but still find a school liable by substituting another duty such as an augmented obligation to maintain safe premises.[5]

- The more extensively a school regulates student conduct the more vulnerable it may be to claims of "negligence" when its regulatory procedures fail to prevent an injury.

The School's Duties as Landlord or Proprietor

Colleges and universities have the same legal duty to maintain safe premises as do all landowners. The university cannot be held liable simply because a student injures himself or another on school property.[6] But a university may be responsible if it fails to correct a foreseeably dangerous condition, stop a continuing pattern of dangerous conduct, or provide adequate security at events such as football games or parties that traditionally present behavior problems.[7]

Schools should be alert and respond quickly to any disorderly behavior on campus before irresponsible conduct causes injury or property damage. Reasonable efforts should be taken to provide additional security patrols and prevent misconduct at dances, sporting events, during fraternity rush season, or other social events that have a history of rowdiness. In addition, a university may risk liability by failing to deal effectively with repeat student offenders or groups of offenders whose hazardous conduct eventually results in personal injury or property damage.

MAINTAINING SAFE PREMISES

- Respond quickly to complaints and other evidence of disorderly, boisterous or dangerous conduct.

- Be well prepared for the problems accompanying special events such as homecoming, rush week, social weekends or other occasions associated with drinking.

- Take steps necessary to prevent recurrence of unacceptable alcohol-influenced conduct by individuals or groups that are repeat offenders.

Most courts have rejected efforts by plaintiffs to disguise an *in loco parentis* case with premises liability arguments. Thus, the failure to prevent drinking in dormitories is not a "dangerous condition" for which a university becomes liable for a later car accident.[8] Several recent cases categorically reject the contention that the duty to maintain safe premises requires colleges to prevent binge drinking on campus.[9] Unless recurring patterns of alcohol abuse involving particular persons, places, or events endanger persons on the campus, schools should not be legally liable for isolated incidents involving students who have been drinking.

Furek, of course, involves recurring conduct. While that decision is open to criticism and involved the aggravating factor of hazing, it stands as a warning that colleges and universities should be especially vigilant to bring an end to activities or events that are known to pose dangers.

The University as Seller of Alcohol

With the rise of the drinking age to 21, many schools have stopped selling alcohol in campus pubs or student unions.[10] Other institutions continue to sell alcohol because they have a large population of students over 21 or because they believe offering alcohol on campus will reduce alcohol-related accidents off campus.

All states have laws or regulations governing the sale of alcoholic beverages, and they typically require that vendors be licensed. In most states there are also statutes, commonly called "dramshop" acts, making it unlawful to sell alcohol either to a minor or an intoxicated person. The scope of these laws and the liabilities they impose vary considerably from state to state.[11]

In some states dramshop laws impose strict liability without regard to the seller's actual knowledge of the purchaser's age or sobriety.[12] These laws impose a duty on the seller to determine that a drinker is sober and of legal age before selling an alcoholic beverage. Dramshop laws are likely to apply to many situations in which colleges or universities sell alcohol, including university-sponsored dances, fund raisers, sports events, or alumni gatherings.

In some states where no statute imposes civil liability, the courts have nevertheless given injured third parties the right to sue the seller for damages.[13]

IF YOUR SCHOOL SELLS ALCOHOLIC BEVERAGES

- Know all state and local laws relating to licensing and sales of alcoholic beverages.
- Provide training (such as TIPS*) and implement procedures to ensure compliance with "dramshop" laws imposing liability for sales to minors and intoxicated persons.

**Training for Intervention Procedures by Servers of Alcohol*

The potential for sweeping, strict liability under dramshop laws obliges every school to be familiar with state and local laws governing the sale of alcohol. In most states, a university should not be held responsible for sales of alcohol by fraternities, clubs, and extracurricular associations.[14] But local law could be different. The college should consider advising campus organizations of the potential liabilities under dramshop statutes as well as the licensing and other requirements governing sales of alcoholic beverages. Unless the university intends to directly supervise such organizations or absolutely prohibits them from selling alcohol, it may wish to leave the responsibility of legal compliance to the organizations themselves.

The University as Social Host

A controversial aspect of the recent trend toward discouraging alcohol abuse is the extension of dramshop liabilities in some states to non-commercial or "social" hosts who serve alcoholic beverages to minors or intoxicated persons.[15]

This evolving area of the law is a special concern for colleges and universities. The extent of social host liability varies by state. It is difficult to provide guidelines for every jurisdiction. Dramatically illustrating this are recent Pennsylvania Supreme Court decisions suggesting that Bradshaw might be decided differently today because of intervening changes in that state's social host law.[16] In one recent case,[17] the Pennsylvania court said that the university might be liable as a social host where it "was involved in the planning of these events or the serving, supplying, or purchasing of liquor." But the court refused to impose social host liability where the school did not actually furnish alcoholic beverages; it rejected the argument that a social host should be liable if it merely should have known of events at which alcohol would be furnished to minors.

Courts seem to be resisting efforts to expand social host liability beyond a "knowingly furnished" standard, because such an expansion of liability would be *in loco parentis* in disguise:

♦Another Pennsylvania court refused to hold a college liable as social host (or as property owner) for the death in a motorcycle accident of a freshman who had been drinking at a fraternity party held in violation of a number of the rules in the school's written policy on alcohol. The court stressed that "no representatives of the college were present when decedent was drinking at the fraternity house, and it cannot be shown that the college assisted in the procurement or distribution of the alcohol in any way."[18]

♦A federal court in Pennsylvania rejected the "social host" claims of a student who was injured in a fall after drinking heavily at on-campus parties conducted in violation of the school's alcohol policy. The court said that social host liability should not be imposed on a university that did not "plan or control the parties; . . . supply any of the alcohol or even remotely assist in plaintiff's underage drinking binge," because a looser standard would be tantamount to reviving *in loco parentis*.[19]

♦A Washington state court held that a university could not be held liable for failing to prevent a student from possessing and drinking alcohol in his dormitory room, because the room (subject to students' rights of privacy) cannot be premises under the control of the university for purposes of the social host liability.[20]

"SOCIAL HOST" LIABILITY

- Does it apply in your state?
- Ensure that the school does not "furnish" alcoholic beverages to underage students either directly or through "agents" (including faculty, resident advisors, and others) who purchase the alcohol or who organize and participate in events at which drinks are served.
- Be aware of even stricter rules in a few jurisdictions (e.g., potential liability of person providing facilities with knowledge that minors will use them for drinking).

Every college should become familiar with the social host laws in its state. In addition, the following points should be considered:

- Remember that a school can be liable for furnishing beverages that are purchased or provided by its "agents" such as resident dormitory advisors or faculty members. But courts do not impose liability simply because alcohol is provided to students on campus by student organizations in violation of campus policies.
- Colleges and universities are unlikely to face legal liability in circumstances where:

  (1) their alcohol policies place the burden of compliance with regulations on the student organizations themselves;

(2) no agents of the school (faculty, administrators, advisors) are present to give implicit approval or sponsorship of the event;

(3) violations of the alcohol policy are punished when school personnel learn of them through complaints, observation by school officials, unruly behavior or otherwise;

(4) dangerous conduct is the subject of strong discipline; and

(5) recurring violations by individuals or groups are not tolerated.

Procedural Requirements of the Drug-Free Schools and Communities Act Amendments of 1989

Concern over student alcohol and drug abuse prompted the federal Drug-Free Schools and Communities Act Amendments of 1989 (the "Act").[21] The Act requires each college and university that receives federal funds in any form (including institutions attended by students receiving guaranteed student loans) to certify to the Department of Education that it has implemented a program designed to prevent the illegal use of drugs and alcohol. Schools that do not comply may be disqualified from receiving federal funds or participating in student loan programs.

At a minimum, each school must adopt a substance abuse program that:

- prohibits the unlawful possession, use, or distribution of drugs or alcohol on college property or as part of a college activity;
- distributes annually to all students (and employees) a document describing the health risks of using illicit drugs and alcohol; available counseling programs; local, state and federal legal sanctions; and the college's own sanctions; and
- establishes sanctions up to and including expulsion and referral for prosecution.

In addition, the school must:

- ensure consistent enforcement of its sanctions;
- provide upon request a copy of the program to the Secretary of Education; and
- review its program at least every two years.[22]

BIENNIAL REVIEWS OF ALCOHOL POLICIES

Review committees might include representatives from:

- student services (including counseling);
- risk management;
- student organizations (including fraternities and sororities);
- campus police;
- faculty;
- community relations;
- event management; and
- student body.

Information to consider includes:

- review of alcohol-related incidents which have occurred under the existing policy, and the enforcement of sanctions;
- identification of events, traditions, or practices which have been problematic;
- suggestions and criticisms of the current policy made by students, staff, and faculty;
- policies from other institutions;
- trends and changes in the law; and
- statistics on alcohol-related crime and disciplinary actions, number of campus events registered where alcohol is served, and the number of students participating in alcohol education and/or counseling.

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It is important that colleges understand what the Act does not require, as well as what it demands. Schools must adopt rules prohibiting student conduct that violates the law; they need not impose additional standards of conduct for lawful drug and alcohol-related activity.[23] Similarly, sanctions are required only for the unlawful possession, use or distribution of drugs and alcohol. Colleges are not required to assume new obligations to protect students from their own use of illicit drugs or abuse of alcohol, or to protect students or third parties from the actions of students using drugs or alcohol.

COMPLYING WITH THE DRUG-FREE SCHOOLS ACT

- Adopt a written policy on substance abuse that satisfies at least the minimum requirements of the Act.
- Carefully consider the consequences, including enforcement practicalities and potential assumption of additional legal duties, before adopting a policy that exceeds the minimum requirements of the Act.
- Ensure that implementation and enforcement procedures are consistent with students' rights to privacy and due process.

Federal regulations define a "college activity" covered by the Act to include all student activities, on or off campus, considered to be university-sponsored events.[24] Schools may wish to consider including language in their policy statements that would prohibit unlawful conduct occurring at such off-campus events, while being careful not to assume any enforcement obligations apart from taking action when and if such circumstances come to the attention of school officials. Because off-campus activities present risks of drug and alcohol-related accidents that are difficult to control or supervise, each institution should consider how extensively it wishes to police such events.

Providing Services Relating to Alcohol Abuse

Colleges are required to inform students about available treatment options and to establish and enforce sanctions for illegal use of drugs and alcohol. Colleges are not required to provide treatment programs or to test students for alcohol or drug use.[25]

A school that provides treatment or screening programs should be aware of associated legal obligations. A college operating a treatment program would be held to the standard of care of any institution operating any health-care program, including the consequences of negligent treatment. And schools using testing or similar measures to identify substance abusers should take care not to violate students' privacy rights.[26]

Many school policies require professional counseling for students who are substance abusers. Those that recommend or mandate use of particular counsellors or programs should be sure that the selected counsellors have all necessary credentials and are competent and well-trained.

"Resident advisors clearly explain the alcohol guidelines on the first night new students arrive on campus. Subsequently, they are expected to address violations of the alcohol policy as they are observed. While this does not include reporting them to Public Safety, it does mean educating the students about their obligations and responsibilities."

Denise M. Darrigrand
Dean of Student Life
Wesleyan University

Enforcing the Policy

The Act does not require the institution to specify how it will enforce its disciplinary sanctions,[27] so long as the actual enforcement is effective and consistent.[28] A school may enforce its policy by consistently imposing sanctions only when it becomes aware of policy violations.[29] In that case, the school should respond to complaints and observations of residential advisors or other employees of the institution.

An institution deciding upon a more active enforcement role should take care not to invade the rights of students. The Act does not limit or qualify students' right to privacy. An institution must respect students' privacy when developing procedures for compiling information about student use of drugs or alcohol, imposing sanctions, and providing information to law enforcement agencies.[30]

Enforcement of drug and alcohol policies raises two distinct privacy concerns. First, techniques used by the school for the identification of potential violators (such as dormitory searches or testing) may be unduly intrusive. Second, concerns about confidentiality may arise when enforcement of drug and alcohol policies results in the compilation of records about student conduct. Information in such program records and individual students' files may be subject to constitutional privacy rights and the restrictions of the Family Education Rights and Privacy Act of 1974 (the "Buckley Amendment" or "FERPA").[31]

Similarly, the Act does not curtail a student's right to procedural due process when a college imposes sanctions for illegal use of drugs or alcohol. Courts routinely require colleges to ensure fairness in their disciplinary procedures, including reasonable notice and an opportunity for a hearing before an impartial decision-maker before sanctions are imposed.[32] The formality required of the hearing procedure depends on the seriousness of the threatened sanctions. Colleges should review each step in the drug and alcohol program to ensure that students receive notice and information about the charges against them, and hearing opportunities that are adequate in light of the severity of the potential sanctions they face.

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Schools should strive to maintain consistency between what they say and what they do, because the greatest risks of legal liability lie in contradictions between stated policy and actual practice.

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Evenhanded Enforcement and Guided Discretion

Although the Act requires consistent enforcement of sanctions, it does not specify how much discretion the university has in imposing punishment. The Secretary has stated only that institutions may consider "the circumstances surrounding each case" so long as the institution "treat[s] similarly situated offenders in a similar manner."[33]

The Act does not protect institutions from liability for imposing sanctions that may be improper on such grounds as negligence, breach of contract, denial of equal protection, malicious prosecution or bias. In addition, courts have required that colleges satisfy the federal constitutional guarantee of "substantive due process" by imposing sanctions that are adequately supported by the factual record and that are not arbitrary or capricious.[34]

Colleges must establish procedures that protect both the institution and individuals from claims arising out of actions taken to implement the college's drug and alcohol program. At a minimum, colleges should develop procedures that provide:

(1) standards to guide the exercise of decision-making,

(2) training, adequate review and supervision, and retraining as necessary for employees implementing the program, and

(3) periodic reassessment to identify any problems that might require changes in the program.

CONSIDERATIONS IN DRAFTING AND ADMINISTERING POLICIES GOVERNING STUDENT USE OF ALCOHOL

Colleges and universities should draw encouragement from recent judicial decisions that refuse to hold schools liable for injuries resulting from student drinking in violation of written alcohol policies.[35] They emphasize that in circumstances involving good faith efforts by universities to combat alcohol abuse, students are responsible for their own personal conduct.

There can be no guarantee that future decisions will not impose stricter standards. But the distinct trend of rulings during the past 15 years offers a strong basis for schools to design their alcohol policies to protect and educate their students rather than simply to minimize potential liability.

"Americans do not have a consensus on alcohol use and misuse. ... What may be good for one school may not be for another, given the myriad of norms and social behaviors."

Tom Goodale
Vice President for Student Affairs at Virginia Tech and Co-founder of BACCHUS*

*Boost Alcohol Consciousness Concerning the Health of University Students

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Design a Customized Policy

Thousands of colleges and universities have adopted written policies governing student use of alcohol, and the Drug Free Schools Act requires that these policies be reviewed biennially. Schools have much to learn not only from their own experience, but also from the successes and failures of other institutions. School personnel should regularly exchange copies of the written policies and information about how well they have worked.

It would be a serious mistake, however, uncritically to adopt another school's alcohol policy or to copy some other off-the-shelf model. Beyond requiring compliance with applicable state and local law, there can be no standard policy appropriate for all schools. Rules that would be practical and appropriate for a small religious college in a rural town cannot be transplanted to a large university in a metropolitan area. And between these extremes lie as many variations as there are schools with their own traditions, values, community setting, and other characteristics making American higher education so diverse.

Between the poles of outright prohibition and policies that simply incorporate state and local law are many approaches, including the following:

(1) selective bans on particular matters, such as:

- hard liquor,
- beer kegs,
- drinking games,
- "open" parties,
- charging of admission,
- places where alcoholic beverages may be drunk or possessed;

(2) regulation of events at which alcohol is to be served, including:

- registration requirements for parties,
- limitations on the quantity of alcohol that may be available based on pre-approved attendance,
- mandatory presence of security guards,
- rules that alcohol may only be served by authorized "servers" who have received training,
- requirement that food and non-alcoholic beverages be available,
- mandatory pre-filing of guest lists,
- rules against attendance by persons under 21 at any function where alcohol is to be served,
- registration and tracing of beer kegs by serial number,

- required attendance of school personnel or advisors;

(3) "licensing" of organizations permitted to serve alcohol, based on attendance at orientation sessions and continued good conduct.

"Except for private parties, any campus event where alcohol is served will require a police detail. The police are there to see that state laws and Institute rules are followed."

Anne Glavin
Chief of Campus Police
MIT

Adopt Rules and Sanctions that Can and Will be Enforced

It is always a mistake to write an alcohol policy containing rules that the school will be unable (or unwilling) to enforce, such as broad bans, elaborate procedures, close supervision, or heavy sanctions. For example, few schools could enforce an outright prohibition against any alcohol on campus, with any violation punishable by expulsion.[38] A college that adopts such an approach, and then winks at violations, runs the risk that a student injured by an intoxicated classmate could successfully argue that the school was negligent by failing to take reasonable steps to provide the alcohol-free environment promised by its policy.

The same principle applies to more modest rules, such as bans on keg beer or hard liquor, requirements for pre-registration of parties at which alcohol is served, limitations on and monitoring of the quantities of alcohol to be served, or procedures requiring the identification of designated "servers." A university cannot afford to ignore violations of the rules, nor should it adopt compliance or verification procedures that are not conscientiously implemented.

Place Personal Responsibility for Compliance Upon Students

Courts have refused to apply the doctrine of *in loco parentis* to college students on the ground that they are young adults who are not amenable to close supervision and who are personally responsible for their own conduct. Most school alcohol policies acknowledge the same principles through regulations that place the burden of complying with rules and procedures upon students and student groups themselves, rather than appointing faculty advisors or other school agents to ensure compliance. Typically, such a policy will state that:

- students are considered to be adults who are personally responsible for conforming their behavior to state and local law and to the school's alcohol policy;

- the school respects students' privacy and autonomy, assumes that they will behave legally and responsibly, and will not use intrusive means to verify compliance (such as room searches, package inspection, etc.) or closely monitor student activities and groups;

- when violations of law or policy come to the attention of school officials, however, specified sanctions will be imposed and repeat violations will be dealt with severely.

"We have faculty and students working collaboratively in developing procedures that will encourage responsible adult behavior. The practice of students accepting responsibility for compliance (versus institutional authority) will nurture such behavior."

Patricia Guagliardo
Director of Insurance
and Risk Management
University of Rochester

Alcohol policies should state that student groups sponsoring social events are the hosts responsible for complying with all laws and regulations. Two recent court decisions have refused to impose liability on schools for injuries resulting from the failure of student groups to comply with school alcohol policies imposing compliance obligations on student groups:

♦In Booker v. Lehigh University (1992), the alcohol policy provided that "party hosts are responsible for ensuring that only persons 21 years of age or over are served alcoholic beverages," and required that hosts hire uniformed security guards to check identification and register parties in advance (concerning which the policy expressly disclaimed school approval). In rejecting arguments that the university should be liable for injuries resulting from underage drinking, the court stressed that the policy imposed direct obligations as host upon student organizations, which was inconsistent with direct school supervision akin to *in loco parentis*.[37]

♦In Millard v. Osborne (1992), the college's alcohol policy "accorded certain amounts of responsibility to college students as intelligent, responsible members of society," and required student groups hosting parties to follow detailed regulations governing admission to parties; limiting the quantity of alcohol available; banning hard liquor; requiring registration of parties with the dean's office; and providing for monitoring by school security personnel. The court refused to hold the college liable for injuries resulting from drinking in violation of the policy because the school had not "assumed a special duty to control the behavior of its students by implementing [such] an alcohol policy and undertaking to enforce it."[38]

Imposing compliance duties on student groups is not an abdication of the school's obligations. It is a basis for clearly stating the respective roles and responsibilities of the students and of the college. Students (and student groups) are responsible for complying with the law; they, and not the school, are the hosts; and the college will exercise reasonable efforts but not intrusive, day-to-day supervision to monitor compliance. For the system to work, students must assume responsibility and be disciplined if they do not. Some colleges have found it helpful to publish reports of actual alcohol violations and sanctions imposed in campus publications (with all personal identifiers deleted).

Emphasize Education

Education is the mission of colleges and universities, and it should play a part in each schools' alcohol policy. Schools may wish to go beyond the barebones requirements of the Drug Free Schools Act and provide all students with orientation classes addressing substance abuse and its dangers. Mandatory counselling or classes can be required of those who violate the college's alcohol policy, which is a "sanction" that aims more to educate than to punish.

By emphasizing education, colleges and universities not only play to their strength, but they also underscore that the problem of student alcohol abuse cannot be solved by rules and sanctions alone. Since there is no practical way to control the private conduct of young adults, educational initiatives are best calculated to assist them in making mature and responsible decisions for their personal lives. Conscientious educational programs should be strong evidence that a school is exercising "due care" in relation to alcohol on campus.

"Violations of the alcohol policy are referred to a judicial hearing officer at the Center for Conflict Resolution. Resident advisors will discuss the charges with the officer. The student has the right to appeal the officer's decision to a judicial panel comprised of students and staff. In the case of alcohol policy violations, the sanctions will always include alcohol education."

Dr. Dennis Reardon
Coordinator for Drug Prevention and Education
Texas A&M University

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Schools are unlikely to be held to a standard of perfection in administering their policies, but sloppy or haphazard performance of duties undertaken in the policy might appear to be negligence in the 20/20 hindsight that accompanies an accidental injury or death resulting from binge drinking.

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Focus on Danger Areas

In drafting and administering its alcohol policy, each college and university should pay special attention to the chief danger areas associated with student drinking. Setting aside the special issues presented when a school sells alcoholic beverages, the key danger areas are social host liability and recurring rowdy or disorderly conduct.

We have already noted that the school's alcohol policy and procedures should make clear that student groups serving alcohol at parties or other functions are the hosts, and that the school does not sponsor or approve such functions. Beyond that, colleges and universities must be aware that they can become an unwitting host when faculty or other employees purchase alcohol or are closely involved in the planning of parties.

The need to deal effectively with recurring disorderly conduct should be self-evident but is too often ignored. The problem is typically presented by particular individuals or groups (the "animal house" fraternity), or events historically linked with binge drinking or rowdy behavior (hell week, homecoming, Halloween, St. Patrick's Day). Many schools continue to tolerate such conduct as an amusing tradition, but it invites legal liability for failing to maintain safe premises. Should an accident occur, or should intoxicated students maliciously hurt others, the school's failure to bring recurring unacceptable conduct under control might be regarded as careless disregard of warning signals.

Enforce the Policy Consistently While Respecting Students' Rights

A school that does not observe this guideline is unlikely to have an effective policy because students (and reviewing courts, if there is litigation challenging the enforcement procedures) will regard it as arbitrary and capricious and perhaps discriminatory against particular persons or groups. Consistent and diligent enforcement is also necessary to avoid allegations that the school has failed to live up to its own standards by indifference to violations of its policy.

"It is very important that schools maintain consistency between what they say and what they do.. Consistent action may mean that a college imposes controls on beer advertising for institutional activities, or applies regulations for alcohol use to <u>all</u> campus functions including events such as faculty receptions.."

Richard Stenard
Dean of Student Affairs
Eastern Oregon State College

Conclusion

Beyond satisfying the minimum requirements of the Drug Free Schools Act, each college and university has broad discretion in tailoring a student alcohol policy for its community. The college policy is not the written document drafted to comply with the Act. It is instead what the school actually does to address the problem of student alcohol abuse. Schools should strive to maintain consistency between what they say and what they do, because the greatest risks of legal liability lie in contradictions between stated policy and actual practice.

From the standpoint of potential legal liability, it is important that the alcohol policy be drafted and implemented with concern for students' welfare. A college that demonstrates a sincere and consistent concern for students is less likely to be sued when accidents occur, and can present a stronger, more appealing case if it must defend itself in court.

ENDNOTES

1. Center on Addiction and Substance Abuse at Columbia University, Rethinking Rites of Passage: Substance Abuse on America's Campuses (June 1994).

2. See, e.g., Beach v. University of Utah, 726 P.2d 413 (Utah 1986) (university not liable for student's injuries sustained in a fall after drinking during evening off-hours on geology field trip); Whitlock v. University of Denver, 744 P.2d 54 (Colo. 1987) (college has no duty to protect student from hazards of trampoline jumping during a private party at his on-campus fraternity house); Eiseman v. New York, 511 N.E.2d 1128 (N.Y. 1987) (school not liable for student's murder at the hand of convict admitted to remedial program).

3. 612 F.2d 135 (3d Cir. 1979), cert. denied, 446 U.S.909 (1980).

4. 594 A.2d 506 (Del. 1991).

5. See, e.g., Mullins v. Pine Manor College, 449 N.E.2d 331 (Mass. 1983) (school owes duty to protect students on campus from assaults because of the "concentration of young people, especially young women, on a college campus").

6. See, e.g., Baum v. Reed College, 401 P.2d 294 (Ore. 1965).

7. See Brown v. Florida State Board of Regents, 513 So. 2d 184, 186 (Fla. App. 1 Dist. 1987) (swimming without lifeguard in university-owned lake recreational area); Stockwell v. Board of Trustees, 148 P.2d 405 (Cal. 1944) ("promiscuous" use of BB guns on campus). Similarly, a school may be negligent if it fails to protect others from a student known to be abusive. See Korenak v. Curative Workshop Adult Rehab. Center, 237 N.W.2d 43 (Wis. 1976).

8. Baldwin v. Zoradi, 123 Cal. App.3d 275, 294; 176 Cal. Rptr. 809, 820 (1981).

9. See, e.g., Hartman v. Bethany College, 778 F.Supp. 286 (N.D.W.Va. 1991) (college's duty to maintain safe premises does not require school to prevent students from drinking; Leonardi v. Bradley University, 625 N.E.2d 431 (Ill. App. 1993) (same; "no duty to warn" students of the dangers of assault by intoxicated fraternity members).

10. See J. Gabriel Neville, "College Nightclubs Now on a Dry Run," New York Times, Nov. 5, 1989, at II-18.

11. See Timothy M. McLean, Tort Liability of Colleges and Universities for Injuries Resulting from Student Alcohol Consumption, 14 J.C. & U.L. 399, 408-13 (1987); Special Project, Social Host Liability for the Negligent Acts of Intoxicated Guests, 70 Corn. L. Rev. 1058 (1985).

12. See, e.g., Iowa Code § 123.49.

13. See Largo Corp. v. Crespin, 727 P.2d 1098 (Colo. 1986) (en banc); Nehring v. La Counte, 712 P.2d 1329 (Mont. 1986); Annotation, Common Law Right of Action for Damage From Sale or Gift of Liquor or Drug, 97 A.L.R. 3d 528 (1980).

14. See, e.g., Campbell v. Trustees of Wabash College, 495 N.E.2d 227 (Ind. App. 1986) (college cannot be held liable for fraternity's serving alcohol).

15. See, e.g., Recent Decisions, Tort Law -- Intoxicating Liquors -- Minors -- Social Hosts -- Universities -- National Fraternities, 29 Duq. L. Rev. 357 (1991); Comment, Social Host Liability on Campus: Taking the 'High' Out of Higher Education, 92 Dick. L. Rev. 665 (1988); McLean, supra note 11, at 407-13; Special Project, supra note 11.

16. See Congini v. Portersville Valve Co., 470 A.2d 515 (Pa. 1983).

17. Alumni Assoc. v. Sullivan, 572 A.2d 1209 (Pa. 1990).

18. Millard v. Osborne, 611 A.2d 715, 720 (Pa.Super.1992).

19. Booker v. Lehigh University, 800 F.Supp. 234, 241 (E.D.Pa. 1992).

20. Houck v. University of Washington, 803 P.2d 47 (Wash.App.), review denied, 812 P.2d 103 (1991).

21. 20 U.S.C. § 1145g. The U.S. Department of Education has issued final regulations implementing the Act. 34 C.F.R. § 86.

22. The Secretary of Education has established sanctions for colleges' inadequate implementation of the Act, 34 C.F.R. § 86.5, and regulations call for auditing a sample of college programs each year.

23. See 55 Fed. Reg. 33,580, at 33,595 (1990) (Appendix C -- Analysis of Comments and Responses).

24. See 55 Fed. Reg. at 33,595-96.

25. See 55 Fed. Reg. 33,580, at 33,595 (1990) (Appendix C -- Analysis of Comments and Responses) (advising that colleges and universities need not "identify and provide an employee assistance program and student assistance program").

26. University of Colorado v. Derdeyn, 863 P.2d 929 (Col. 1993) cert. denied, 114 S.Ct. 1646 (1994); Anable v. Ford, 653 F.Supp. 22, modified, 663 F.Supp. 149 (W.D. Ark.) (1985).

27. See 55 Fed. Reg. at 33,595 (advising that an institution need not "describe its drug prevention program design and plan for implementation, identify the individuals who will plan and implement the program").

28. These requirements are embodied in the Act's mandate that each school conduct a biennial review of its policy "to determine its effectiveness" and "to ensure that the sanctions . . . are consistently enforced." 20 U.S.C. § 1145g(a)(2). By its terms, the requirement of consistent enforcement applies only to those sanctions employed for unlawful possession, use or distribution of drugs and alcohol. See 20 U.S.C. § 1145g(a)(2)(B). The regulations promulgated by the Secretary of Education suggest, however, that additional sanctions adopted for lawful drug and alcohol-related behavior also must be uniformly enforced. See 55 Fed. Reg. at 33,597 (advising that the Act "require[s] a clear statement that the [institution] will impose disciplinary sanctions for violations of its standards of conduct, and consistent enforcement of those sanctions").

29. The Secretary has provided no criteria for determining what level of enforcement satisfies the requirement that the policy be "effective." Instead, a series of self-imposed, objective measures for monitoring effectiveness are recommended. See 55 Fed. Reg. at 33,597.

30. The Act does not require that schools refer all violations of state and federal law for prosecution. See 20 U.S.C. § 1145g(a)(1)(E); 55 Fed. Reg. at 33,597 (advising that "it is up to the discretion of the [institution] to decide which violations of its standards of conduct to refer for prosecution"). Some states do, however, require that persons with knowledge of use of illegal drugs report that information to law enforcement authorities. See, e.g., Colo. Rev. Stat. § 18-8-115 (1989).

31. 20 U.S.C. § 1232g. The Buckley Amendment contains special rules concerning the confidentiality of campus security records. See 20 U.S.C. § 1232g(a)(4)(B)(ii). The Secretary of Education has acknowledged that the Buckley Amendment prevents schools from releasing to law enforcement officials records relating to reported violations of the school's drug and alcohol policy. On the other hand, the Secretary has stated that the Buckley Amendment does not apply to the personal observations of school officials and has accordingly advised that institutions may choose to adopt a policy "requiring staff, faculty and students to report violations to the police." See 55 Fed. Reg. at 33,597.

32. See, e.g., Gorman v. University of R.I., 837 F.2d 7, 12-16 (1st Cir. 1988); Nash v. Auburn Univ., 812 F.2d 655, 660-67 (11th Cir. 1987); Shuman v. University of Minn. Law Sch., 451 N.W.2d 71, 74-75 (Minn. App. 1990); Beaver v. Ortenzi, 524 A.2d 1022, 1024-26 (Pa. Commw. Ct. 1987).

33. 55 Fed. Reg. at 33,597.

34. See, e.g., Nash, 812 F.2d at 667-68 (applying substantive due process analysis to determine whether sanction was "arbitrary").

35. See Millard v. Osborne, 611 A.2d 715; Leonardi v. Bradley University, 625 N.E.2d 431; Booker v. Lehigh University, 800 F.Supp. 234; Tanja H. v. Regents of the University of California, 278 Cal.Rptr. 918; Houck v. University of Washington, 803 P.2d 47.

36. See "Amherst: Prohibition Tried, But the Results are Familiar," New York Times, March 19, 1989 at I-44.

37. 800 F.Supp. at 236-240.

38. 611 A.2d at 717, 720.

NOTE:

This paper provides a general overview of legal principles governing institutional liability arising out of student use of alcoholic beverages. It does not provide a complete and up-to-date analysis of legal rules or requirements in any specific state or locality. Institutions should consult their own legal counsel concerning such matters.